

May 30, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTINA PETRA GONZALES,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:17-CV-05157-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
*INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 15) and the Defendant's Motion For Summary Judgment (ECF No. 16).

JURISDICTION

Christina Petra Gonzales, Plaintiff, applied for Title II Social Security Disability Insurance benefits (SSDI) and for Title XVI Supplemental Security Income benefits (SSI) on April 25, 2013. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on September 9, 2015 before Administrative Law Judge (ALJ) Kimberly Boyce. Plaintiff testified at the hearing, as did Vocational Expert (VE) Trevor Duncan. On June 9, 2016, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

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STATEMENT OF FACTS

The facts have been presented in the administrative transcript, the ALJ's decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. Plaintiff has an 11th grade education¹ and past relevant work experience as an agricultural produce packer. She alleges disability since April 1, 2012, on which date she was 40 years old.

STANDARD OF REVIEW

"The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence...." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

It is the role of the trier of fact, not this court to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749

¹ Per her Disability Report, AR at p. 249.

1 F.2d 577, 579 (9th Cir. 1984).

2 A decision supported by substantial evidence will still be set aside if the proper
3 legal standards were not applied in weighing the evidence and making the decision.
4 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
5 1987).

6 7 **ISSUES**

8 Plaintiff argues the ALJ erred in: 1) failing to develop the record by ordering
9 additional intellectual testing; 2) rejecting the opinion of examining clinical
10 psychologist, CeCilia Cooper, Ph.D.; and 3) failing to provide specific, clear and
11 convincing reasons for discounting Plaintiff's testimony regarding her symptoms and
12 limitations.

13 14 15 **DISCUSSION**

16 **SEQUENTIAL EVALUATION PROCESS**

17 The Social Security Act defines "disability" as the "inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or can
20 be expected to last for a continuous period of not less than twelve months." 42
21 U.S.C. § 423(d)(1)(A) and § 1382c(a)(3)(A). The Act also provides that a claimant
22 shall be determined to be under a disability only if her impairments are of such
23 severity that the claimant is not only unable to do her previous work but cannot,
24 considering her age, education and work experiences, engage in any other substantial
25 gainful work which exists in the national economy. *Id.*

26 The Commissioner has established a five-step sequential evaluation process for
27 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;

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1 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
2 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20
3 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker
4 proceeds to step two, which determines whether the claimant has a medically severe
5 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
6 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
7 of impairments, the disability claim is denied. If the impairment is severe, the
8 evaluation proceeds to the third step, which compares the claimant's impairment with
9 a number of listed impairments acknowledged by the Commissioner to be so severe
10 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
11 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
12 equals one of the listed impairments, the claimant is conclusively presumed to be
13 disabled. If the impairment is not one conclusively presumed to be disabling, the
14 evaluation proceeds to the fourth step which determines whether the impairment
15 prevents the claimant from performing work she has performed in the past. If the
16 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
17 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
18 the fifth and final step in the process determines whether she is able to perform other
19 work in the national economy in view of her age, education and work experience. 20
20 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

21 The initial burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
23 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
24 mental impairment prevents her from engaging in her previous occupation. The
25 burden then shifts to the Commissioner to show (1) that the claimant can perform
26 other substantial gainful activity and (2) that a "significant number of jobs exist in the
27 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
28

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1 1498 (9th Cir. 1984).

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3 **ALJ'S FINDINGS**

4 The ALJ found the following:

5 1) Plaintiff has “severe” medically determinable impairments which include
6 borderline intellectual functioning, affective disorder, anxiety disorder, personality
7 disorder, somatoform disorder, osteoarthritis and obesity;

8 2) Plaintiff’s impairments do not meet or equal any of the impairments listed
9 in 20 C.F.R. § 404 Subpart P, App. 1;

10 3) Plaintiff has the Residual Functional Capacity (RFC) to perform light work,
11 defined in 20 C.F.R. §§404.1567(b) and 416.967(b), except she cannot climb ladders,
12 ropes or scaffolds; can frequently stoop, kneel, crouch and climb ramps and stairs;
13 can occasionally crawl; can perform work in which concentrated exposure to extreme
14 cold, heat, vibration, fumes, odors, dusts, gases, poor ventilation and/or hazards is not
15 present; she can understand, remember and carry out unskilled, routine and repetitive
16 work that can be learned by demonstration and in which the tasks to be performed are
17 predetermined by the employer; she can cope with occasional changes in the work
18 setting; she can work in proximity to co-workers, but not in a team or cooperative
19 effort; she can perform work that does not require interaction with the general public
20 as an essential element of the job, but incidental contact with the general public is not
21 precluded;

22 4) Plaintiff’s RFC precludes performance of her past relevant work;

23 5) Plaintiff’s RFC allows performance of other jobs existing in significant
24 numbers in the national economy, including production assembler, hand packager and
25 assembler.

26 Accordingly, the ALJ concluded Plaintiff is not disabled.
27
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DUTY TO DEVELOP RECORD

The ALJ has a basic duty to inform herself about facts relevant to her decision. *Heckler v. Campbell*, 461 U.S. 458, 471 n. 1, 103 S.Ct. 1952 (1983). The ALJ's duty to develop the record exists even when the claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001). The duty is triggered by ambiguous or inadequate evidence in the record and a specific finding of ambiguity or inadequacy by the ALJ is not necessary. *McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011).

Plaintiff underwent a psychological examination by Philip G. Barnard, Ph.D., on February 8, 2013. This examination was conducted at the behest of the Washington State Department of Social and Health Services (DSHS). The examination included testing, specifically the Wechsler Memory Scale (WMS)-IV and the Wechsler Adult Intelligence Scale (WAIS)-IV. (AR at p. 330). During testing, Plaintiff "obtained a Raw Score of 0 on Trial 1 and Trial 2, indicating extremely poor effort." (AR at p. 330). Dr. Barnard diagnosed the Plaintiff with "Malingering," in addition to "Learning Disorder, NOS [Not Otherwise Specified]," and "Borderline Intellectual Functioning." (AR at p. 328). He opined that Plaintiff had no more than "moderate" limitations on her abilities to perform basic work activities. (AR at p. 329). Dr. Barnard asserted that Plaintiff "engaged in significant exaggeration and magnification symptomatology" and "[s]he appeared to be consciously deceptive with poor motivation and poor effort on the psychological testing process." (AR at p. 330). On the WAIS-IV, Plaintiff "obtained a Full Scale [Intelligence Quotient] Estimate of 49." (AR at p. 330).

An IQ of 69 and below is classified as "intellectual disability" as reflected in Listing 12.05 which specifies four ways an individual may qualify as intellectually disabled without requiring any further inquiry into her ability to work: (1) "[m]ental incapacity . . . such that the use of standardized measures of intellectual functioning

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1 is precluded;” (2) [a] valid verbal, performance, or full scale IQ of 59 or less;” (3) “[a]
2 valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other
3 mental impairment imposing an additional and significant work-related limitation of
4 function;” and (4) “[a] valid verbal, performance, or full scale IQ of 60 through 70,
5 resulting in at least two [milder impairments].” It is apparent that because of what he
6 considered Plaintiff’s poor effort on testing, Dr. Barnard did not consider valid the
7 full scale IQ estimate of 49 yielded from that testing.

8 Over a year later on April 10, 2014, Plaintiff was psychologically evaluated by
9 CeCilia Cooper, Ph.D.. Among the records reviewed by Dr. Cooper was the
10 evaluation by Dr. Barnard. Dr. Cooper noted that Plaintiff’s scores on the WAIS-IV
11 and WMS-IV “were in the extremely low range” and “[i]t was felt that she did not
12 make much effort to do the tasks involved.” (AR at p. 468). Regarding the
13 “Memory” portion of her Mental Status examination, Dr. Cooper indicated that
14 Plaintiff “repeated one trial of five digits forward correctly on the digit span subtest
15 of the WAIS-IV,” that “[h]er raw score was seventeen,” and that “[h]er scaled score
16 was five which is in the extremely low range.” (AR at p. 472).² It is unclear,
17 however, if Dr. Cooper was referring to scores from the WAIS-IV testing performed
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19 ² The WAIS-IV consists of four indexes, one of which is the Working
20 Memory Index (WMI). One of the Working Memory subtests is the digit span
21 which has three parts: Digit Span Forward (individual tries to repeat digits
22 forward); Digit Span Backward (individual tries to repeat digits backward); Digit
23 Span Sequencing (individual tries to repeat digits in ascending order). The digit
24 span subtest measures auditory recall, short term memory and working memory.
25 http://washingtoncenterforcognitivetherapy.com/wp-content/uploads/2015/01/greenwood_description-wais-1.pdf
26 Dr. Barnard indicated that Plaintiff’s “Composite Score” on the WMI portion of
27 the WAIS-IV administered by him was 50.
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1 by Dr. Barnard. Those scores do not match up with scores reported by Dr. Barnard
2 on the DSHS form completed by him and Dr. Barnard's actual testing report is not
3 part of the record. It is unclear whether Dr. Cooper performed her own WAIS-IV
4 testing, or if she is referring to scores from testing conducted by another provider,
5 other than Dr. Barnard. Dr. Cooper felt that Plaintiff's short-term memory and
6 immediate memory were impaired. (AR at p. 472). She diagnosed Plaintiff with
7 "Major Depressive Disorder, recurrent, with psychotic features," "Somatic Symptom
8 Disorder, Persistent, Moderate," and "Borderline Intellectual Functioning (with
9 learning disabilities, by history)."³

10 At the administrative hearing, Plaintiff's counsel referred to Dr. Cooper's
11 comment about Plaintiff's digit span subtest and the resulting scores, although he
12 errantly attributed the comment to Mary Pellicer, M.D., instead of Dr. Cooper. (AR
13 at p. 49).⁴ Counsel suggested Dr. Cooper conducted her own WAIS-IV and that it
14 was "just not in here [the record] for some reason." (AR at p. 49). Counsel stated the
15 following:

16 So if there are scores, I don't know if there's a way
17 to request that from [Cooper]. I don't know if I'm
18 allowed to write [Cooper]. I don't want to cross
19 boundaries. I guess I don't know what the policy on
that is to find out if she did that testing or not. That
could make a listings issue if it's low enough. I just
don't know.

20 (AR at p. 50). The ALJ responded that she would "have a look at it" (AR at p. 50),
21 and at the conclusion of the hearing, acknowledged her "assignment [was] to figure
22 out where those test scores are." (AR at p. 80).

23 The ALJ's written decision gives no indication what, if any, effort was made
24

25 ³ A full scale IQ in the 70 to 79 range is considered "borderline."

26 ⁴ Dr. Pellicer conducted a physical examination of the Plaintiff on April 11,
27 2014. (AR at pp. 478-83).

1 by her to track down those test scores. Instead, she acknowledged that counsel had
2 requested a consultative psychological evaluation for the purpose of having the
3 Plaintiff retake intelligence and memory testing, but declined to do that on the basis
4 that “the longitudinal record contains sufficient medical evidence of the claimant’s
5 mental impairments.” (AR at p. 20). The ALJ specifically mentioned the results of
6 Dr. Barnard’s testing in February 2013. Because of Dr. Barnard’s reporting that
7 Plaintiff appeared to be consciously deceptive with poor motivation and effort on
8 testing, that ALJ was “not persuaded that [Plaintiff] would give her best effort if she
9 were to retake these tests.” (AR at p. 20).

10 Obviously, what has never been resolved is whether Dr. Cooper was referring
11 to WAIS-IV testing conducted by Dr. Barnard, by herself, or by some other provider,
12 and where the actual testing report might be. At the hearing in September 2015, the
13 ALJ thought it important enough to resolve this question, but apparently changed her
14 mind by the time her written decision was issued almost nine months later in June
15 2016. The court concludes there is ambiguous or inadequate evidence in the record
16 which requires further development of the record and at this point, it seems the best
17 and most efficient course, considering the passage of time, is simply for the
18 Commissioner to order a consultative psychological examination with an entirely new
19 round of intelligence testing (WAIS-IV and WMS-IV). The examiner’s written
20 assessment should include the testing report. The results will be considered in
21 determining whether Plaintiff meets Listing 12.05 and if not, how they impact
22 Plaintiff’s RFC and her ability to perform other work in the national economy. “The
23 importance of IQ test results in adjudicating intellectual disability is not limited to the
24 claimant’s ability to meet the listing at step three of the five-step process.” *Garcia*

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1 *v. Commissioner of Social Security*, 768 F.3d 925, 933 (9th Cir. 2014). ⁵

2
3 **CONCLUSION**

4 Plaintiff's Motion For Summary Judgment (ECF No. 15) is **GRANTED** and
5 Defendant's Motion For Summary Judgment (ECF No. 16) is **DENIED**.

6 Pursuant to sentence four of 42 U.S.C. § 405(g) and § 1383(c)(3), this matter is
7 **REMANDED** to the Commissioner for further proceedings as set forth above. An
8 application for attorney fees may be filed by separate motion.

9 **IT IS SO ORDERED.** The District Executive shall enter judgment
10 accordingly and forward copies of the judgment and this order to counsel of record.
11 The file shall be **CLOSED**.

12 **DATED** this 30th day of May, 2018.

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15 *s/Lonny R. Suko*
16 LONNY R. SUKO
17 Senior United States District Judge
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25 _____
26 ⁵ At this juncture, the court makes no determination regarding the ALJ's
27 discounting of Plaintiff's testimony, nor any determination regarding the ALJ's
28 conclusion about Plaintiff's physical RFC.